Supreme Court, U.S.
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No. 94 478

In The

Supreme Court of the United States

October Term, 1994

CRESCENCIA B. TORTUYA,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY
and
MINNESOTA MUTUAL LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 13, 1994

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QUESTIONS PRESENTED

1. Does an efficient proximate cause analysis apply to the determination of life insurance benefits under a policy governed by ERISA?

2. In determining benefits under a life insurance policy when one contributing peril is covered by the policy and the other contributing peril is expressly excluded by the policy, did the appellate court err in concluding that medical malpractice (a covered peril) was not a predominant cause of the decedent's suicide (an excluded peril), when the trial court had made no such determination?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit are those in the caption (C.A. No. 92-16693).

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on May 16, 1994. The order denying the petition for rehearing was

filed on June 15, 1994 (App. C).

OPINIONS BELOW

A copy of the District Court's unpublished opinion is attached to this petition in the Appendix (App. A). The decision of the Court of Appeals is likewise unpublished; a copy of the memorandum opinion is attached to this petition in the Appendix (App. B).

JURISDICTION

The memorandum opinion of the court of appeals (App. B) was entered and filed on May 16, 1994. A timely petition for rehearing was denied on June 15, 1994 (App. C). This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*:

29 U.S.C. § 1144(a) [the "preemption

clause"]
29 U.S.C. § 1144(b)(2)(A) [the "saving clause"]
29 U.S.C. § 1144(b)(2)(B) [the "deemer clause"]

STATEMENT OF THE CASE

The plaintiff in this case is the widow of decedent Gene Tortuya, who was a Vietnam veteran with a history of mental disorders, including schizophrenia. From 1985 until his death Mr. Tortuya was treated by a psychiatrist at the Veterans Administration Hospital in Palo Alto, California. At the VA hospital he was treated with several different types of medications on a regular and routine basis. His treating psychiatrist knew of Mr. Tortuya's psychiatric condition.

Mr. Tortuya had been diagnosed at the VA hospital as having recurrent psychotic episode with depressive features as well as a history of psychosis and depression. He had on more than one occasion expressed to doctors at the VA hospital suicidal inclinations. Minnesota Mutual's expert Dr. Litman

testified that Mr. Tortuya's mental illnesses were particularly associated with suicide. [CR 48 ¶ 11 and Ex. E pp. 22-23.] Dr. Wittner, Mr. Tortuya's treating psychiatrist, admitted that he knew Mr. Tortuya's illness was affected by exacerbations of his schizophrenia and by fluctuations in his environment, particularly levels of stress or negative events in his life. [CR 62 ¶ 2, Ex. 10, p. 80.]

In June 1989 Mr. Tortuya began experiencing a period of severe depression. Seeking treatment, Mr. Tortuya visited the Palo Alto VA hospital on June 11, June 14, and June 19, 1989. He was experiencing depression, disorganization, and sleeplessness. On June 14 Mr. Tortuya had not slept in three nights, felt he was in a crisis situation, visited the staff psychiatrist, Dr. George Gulevich, and requested to be hospitalized. [CR 62 ¶ 2, Ex. 11, p. 17.] Dr. Gulevich declined to hospitalize Mr. Tortuya and instead changed his medication. [CR 61 ¶ 20.]

On June 19, the day of his death, Mr. Tortuya told his psychiatrist he "might hurt himself." [CR 48, Ex. E pp. 21-24.] On that day both plaintiff and Mr. Tortuya again requested that he be admitted to the hospital, but he was again declined admission; instead, his medication was changed again and Mr. Tortuya was asked to return in about four weeks. [AB pp. 15-16.]

That evening Mr. Tortuya went to bed at about 9:00 p.m. after taking his medication, but complained thereafter that it was not working; he got out of bed several times and complained that his head was numb and his ears were ringing. At about 11:30 p.m., Mr. Tortuya left the bed again, took a gun from the closet, went into the bathroom, and shot himself.

At the time of his death Mr. Tortuya had two life insurance policies. One policy was obtained through Mr. Tortuya's employment with United Air Lines and his attendant participation in United's Employee Welfare

Benefit Plan. Metropolitan Life Insurance Company issued a group life insurance policy (policy no. 27747-G) that provided benefits in the event of accidental death or dismemberment. The policy expressly excluded benefits for death by "intentionally self-inflicted injury . . . or suicide . . . while sane or insane." [CR 43 ¶¶ 3, 4, Ex. A, p. 4.] United's employee benefit plan was governed by ERISA.

The second policy was under Minnesota Mutual's Group Mortgage Life Insurance, through the home mortgage lender, San Francisco Federal Savings.[1] The policy, which became effective June 8, 1989 (certificate number 0071569149), paid a death benefit to the lender in the event of the insured's

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[1]Plaintiff originally pursued in this action a claim for benefits against Montgomery Ward & Co., which was settled and dismissed with prejudice. [CR 9.]

Incident to her claim against Minnesota Mutual for mortgage credit life insurance benefits, plaintiff named San francisco Savings & Loan Association a party defendant, solely for notice purposes. [ER 2, Complaint ¶ 1(d).] After it was served process, San Francisco Savings & Loan Association requested that it not be copied on further pleadings in the case; their request has been honored by all counsel.

death. No benefit was payable if the insured "die[d] by suicide, whether sane or insane, within two years from the effective date" of the policy. [ER 2, Ex. B; SE 2 p. 4, and Ex. A p.5.]

Both MetLife and Minnesota Mutual conceded that their policies did not exclude benefits for injuries resulting from medical malpractice. [CR 62 ¶ 2, Ex. 12, p. 2; CR 62 ¶ 2, Ex. 13, p. 2.]

Both MetLife and Minnesota Mutual denied benefits on grounds payment was barred by the policies' express suicide exclusions.

Plaintiff brought suit in the California Superior Court for the County of San Mateo against both companies to recover benefits on grounds Mr. Tortuya's death proximately resulted from medical negligence. Defendants MetLife and Minnesota Mutual removed the action to U.S. District Court for the Northern District of California on the basis of federal question (ERISA) and diversity jurisdiction.

The district court granted summary judgment for both insurance companies on grounds benefits were properly denied under the suicide exclusions because Mr. Tortuya killed himself with suicidal intent, and an efficient proximate cause analysis, while it applies to property insurance contracts, is inapplicable to life insurance contracts. The district court alleged that the California Supreme Court had never applied an efficient proximate cause analysis to require the payment of benefits under a life insurance policy and concluded that if the California Supreme Court were to decide such an issue, it would not apply an efficient proximate cause analysis to life insurance contracts. The district court relied on Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395 (1989), opining that the California Supreme Court would not extend Garvey's holding to life insurance claims.

The Ninth Circuit Court of Appeals affirmed the district court's ruling on grounds

(1) Mr. Tortuya killed himself with suicidal intent; (2) medical malpractice was not the predominant cause of Mr. Tortuya's death, *i.e.*, medical malpractice was not the event that set the others into motion, under the tests set out in Sabella v. Wisler, 59 Cal. 2d 21, 31-32 (1963), and Garvey v. State Farm Fire and Cas. Co., 48 Cal. 3d 395, 770 P. 2d 704, 708 (1989); (3) no case has ever applied an efficient proximate cause analysis to a policy governed by ERISA, so the fiduciary did not abuse its discretion in not employing that analysis; and (4) the rule of *contra proferentem* does not apply to this case because no ambiguity exists in the suicide exclusions in the policies.

The Ninth Circuit denied Plaintiff's timely petition for rehearing in which she argued that (1) the appellate court erred in not looking to California law to resolve an issue for which ERISA provides no guidance because the ERISA plan at issue was insured rather than self-funded, (2) the appellate

court improperly invaded the province of the trial court when it concluded medical malpractice was not the efficient proximate cause of Mr. Tortuya's death, and (3) the appellate court erroneously concluded that the rule of *contra proferentem* is inapplicable to the policies at issue.

Plaintiff contends that the proximate cause of her husband's death was the medical negligence of psychiatrists at the Palo Alto Veterans Administration Hospital. They either knew the decedent was suicidal and their failure to administer proper treatment resulted in his taking his own life when proper treatment would have prevented him from so doing, or Mr. Tortuya's suicidal tendencies resulted from the psychiatrists' negligently prescribing inappropriate medications while aware of Mr. Tortuya's depressive, chronic schizophrenic state. In either case, since both life insurance policies covered medical malpractice, material issues of fact existed at the time the trial court

improperly granted defendants' motions for summary judgment.

Since both the district court and the Ninth Circuit applied erroneous legal principles, an injustice resulted that should not be perpetuated.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding insurance contracts governed by ERISA: whether in determining benefits under an ERISA policy a fiduciary may ignore settled state law on a question of law for which ERISA provides no guidance. The Ninth Circuit's ruling in this case permits an ERISA fiduciary to ignore established legal principles regarding interpretation of insurance contracts simply because the Legislature did not speak on a given issue within the text of ERISA. This result is contrary to the intent of the Legislature in enacting section 514 [29 U.S.C. § 1144], the portion of ERISA that prescribes the laws that govern ERISA-regu-

lated contracts and conflicts with the rulings of this Court in FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 409-10, 112 L. Ed 2d 356 (1990) and Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747, 105 S. Ct. 2380, 2393, 85 L. Ed. 2d 728 (1985), which hold that ERISA preempts state law regarding ERISA-regulated plans that are self-funded, but permits state regulation of insured plans.

In addition, both federal common law and state law may be applied to ERISA-governed contracts when ERISA is silent on an issue.

I. ERISA ONLY PREEMPTS STATE LAW REGARDING SELF-FUNDED EMPLOYEE BENEFIT PLANS; INSURED PLANS ARE SUBJECT TO INDIRECT STATE REGULATION

Section 514(a) of ERISA, the "preemption clause," provides that ERISA supersedes all state laws regarding employee benefit plans, except as provided in § 514(b) [29 U.S.C. § 1144(b)] (the "saving clause"). 29 U.S.C. §

1144(a).[2]

The saving clause provides that, except for subparagraph (B) of that section (the "deemer clause"), ERISA does not "exempt or relieve any person from any law of any STATE which regulates insurance . . . ." 29 U.S.C. § 1144(b)(2)(A).[3]

The deemer clause provides that an employee benefit plan may not be deemed an insurance company or any investment company engaged in the business of insurance for the purposes of state regulation of insurance companies or insurance contracts. 29 U.S.C. § 1144(b)(2)(B).[4]

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[2]29 U.S.C. § 1144(a) [the "preemption clause"] provides in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan.

[3]29 U.S.C. § 1144(b)(2)(A) [the "saving clause"] provides in pertinent part:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

[4]29 U.S.C. § 1144(b)(2)(B) [the "deemer clause"] provides in pertinent part:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be

The deemer clause exempts from state regulation all self-funded employee benefit plans because these plans may not be deemed insurance companies. FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed 2d 356, 366 (1990).

By contrast:

> [E]mployee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer.

Id. (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 734, 735, 747, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) (articulating distinction created by Congress in the deemer clause between insured and uninsured employee benefit plans, the former

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an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

open to indirect state regulation while the latter not).

The MetLife policy here at issue is clearly insured because United Air Lines purchased the plan from Metropolitan Life Insurance Company. As such, it is thus subject to indirect state regulation under the deemer clause, as held in Holliday, and Metropolitan Life.

In addition, when ERISA is silent on a subject, federal courts look to state law or general principles of common law that may be persuasive. Southern Farm Bureau Life Ins. Co. v. Moore, 993 F.2d 98, 102 (5th Cir. 1993).

In Moore the plaintiff claimed accidental death benefits under an ERISA-governed policy from her employer that insured her and her husband after her husband died in a one-car collision. Mr. Moore had had a brain tumor that caused him either to lose consciousness or to have a seizure, which caused the accident.

The policy at issue, which covered injury resulting from "accident[s] resulting directly and independently of all other causes of loss covered by this policy," excluded coverage for "[a] disease or infirmity of the mind or body." Id. at 100.

The district court held that the policy exclusion excluded a loss contributed to by a bodily infirmity or disease only when that infirmity or disease was a concurring proximate cause of death but not when the infirmity or disease was merely a remote cause. Id. at 102. The court instructed the jury that in order to show that coverage was excluded under the policy, it was insufficient for the insurance company to show that the brain tumor contributed to the accident and resulting fire (which caused the death), but instead had to prove that the brain tumor contributed to the death.

On appeal the insurance company argued that the instruction improperly required it to prove that the brain tumor was a concur-

rent proximate cause of the death to fit within the exclusion. Since ERISA did not speak to the question, the Fifth Circuit looked to another Fifth Circuit case whose facts were substantially similar to those in Moore that had applied Texas state law to resolve the issue.

By the same token, the Ninth Circuit should have looked to California state law to resolve the question here at issue rather than simply begging the question. While the facts in Moore are not substantially similar to the facts here at issue, Moore nonetheless establishes that issues of proximate cause, which are not covered by ERISA, must be resolved and that courts look to state law in order to resolve such questions.

II. BOTH FEDERAL COMMON LAW AND CALIFORNIA LAW APPLY AN EFFICIENT PROXIMATE CAUSE ANALYSIS TO INSURANCE CONTRACTS FOR ACCIDENTAL DEATH BENEFITS

In California an insured is entitled to coverage when a peril insured against was the

proximate cause of the loss. Calif. Ins. Code § 530.[5] The insured may nonetheless be denied benefits if the loss would not have occurred "but for" a specifically excluded peril. Calif. Ins. Code § 532.[6] Reading the two statutes together, the "but for" clause of § 532 refers to the proximate cause of the loss, and the "immediate cause" refers to the cause most immediate in time to the loss. Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 402-403 (1989) (citing Sabella v. Wisner, 59 Cal. 2d 21, 33-34 (1963)).

This analysis, referred to as an "efficient proximate cause" analysis, applies to first-party insurance claims. Id. at 401-

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[5]The text of Calif. Ins. Code § 530 is as follows:

> An insurer is liable for loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

[6]The text of Calif. Ins. Code § 532 is as follows:

> If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted.

404. Under this doctrine when both an excluded peril and a covered peril contribute to a loss, the insured may still recover if the covered peril was the efficient proximate cause of the loss. Id.

The efficient proximate cause of a loss is the predominating cause or the one that sets other causes in motion. Id. at 402-03. It is "the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." Id. at 402 (quoting Sabella v. Wisner, 59 Cal. 2d 21, 31-32 (1963)).

This doctrine applies to first-party losses,[7] whether they refer to property claims or accidental death benefits. Garvey, 48 Cal. 3d at 406-08 (claim for property damage). *See* Brooks v. Metropolitan Life Ins. Co., 27 Cal. 2d 305, 163 P.2d 689 (1945)

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[7]A claim is first party if the insured claims coverage for loss or damage sustained by the insured; it is third party if it claims coverage against liability of the insured to another. Garvey, 48 Cal. 3d at 399, n.2.

(efficient proximate cause analysis applied to claim for accidental death benefits) (relied on in Sabella, 59 Cal. 2d 21); Arata v. California-Western States Life Ins. Co., 50 Cal. App. 3d 821 (1975) (double indemnity accidental death benefits).

Federal courts have also applied efficient proximate cause to determine when benefits are payable when a death results from both covered and excluded perils. *See* Meusy v. Montgomery Ward Life Ins. Co., 943 F. 2d 1097 (9th Cir. 1991) (benefits denied when proximate cause analysis revealed no link between outer ear injuries from car accident and suicide that occurred three months later); Dow Chemical Co. v. Royal Indem. Co., 635 F. 2d 379, 388, 391 (5th Cir. 1981) (Texas law of efficient proximate cause applied); Nagel v. Continental Cas. Co., 498 F. Supp. 265 (C.D. Cal. 1980) (insured entitled to benefits after decedent died in hospital while being cared for cancer and adrenal insufficiency, excluded perils, but died from chok-

ing on vomit, a covered "accident").

Clearly, if the Ninth Circuit had looked to California law, or federal common law, then an efficient proximate cause analysis applied to determine whether the loss at issue (Mr. Tortuya's death) was predominately caused by medical malpractice or whether medical malpractice was the cause that set other causes in motion, *i.e.*, whether medical practice caused Mr. Tortuya to commit suicide.

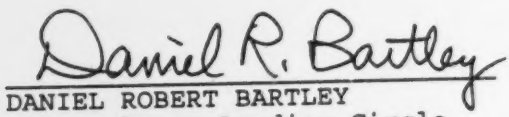
Neither the district court nor the Ninth Circuit ruled that as a matter of law medical malpractice was not an efficient proximate cause of Mr. Tortuya's death. Consequently, the issue was one of fact that should have been considered in determining whether the fiduciary abused its discretion in denying benefits. Likewise, causation was a question of fact that should have prevented the granting of summary judgment in the trial court.

CONCLUSION

The petition for certiorari should be

granted.

Respectfully submitted,



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September 9, 1994

APPENDIX

APPENDIX "A"

District Court Opinion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CRESENCIA B. TORTUYA, Plaintiff, v. METROPOLITAN LIFE INSURANCE COMPANY, MINNESOTA MUTUAL LIFE INSURANCE COMPANY, MONTGOMERY WARD LIFE INSURANCE COMPANY, and SAN FRANCISCO FEDERAL SAVINGS AND LOAN ASSOCIATION, inclusive, Defendants.	Case No. C 90-3491 ORDER **FILED JUL 20 1992** **RICHARD W. WIEKING** **CLERK, U.S. DISTRICT COURT** **NORTHERN DISTRICT OF CALIFORNIA** **ENTERED IN CIVIL DOCKET JUL 23 1992**

This matter comes before the court on the motions of defendants Minnesota Mutual Life Insurance Company (Minnesota Mutual") and Metropolitan Life Insurance Company ("Met-Life") for summary judgment. In addition, plaintiff Tortuya moves to strike declarations made in support of Minnesota Mutual's and MetLife's motions. After a review of the briefs, the court finds it appropriate to submit the motions on the pleadings pursuant

to Local Rule 220-1. The court hereby GRANTS defendants' motions for summary judgment. Plaintiff's motions to strike are DENIED.

I. FACTS AND BACKGROUND

On June 19, 1989, plaintiff's insured decedent, Gene Tortuya, killed himself with a single gunshot wound to the head. Approximately two weeks earlier, the decedent had applied for life insurance under Minnesota Mutual's group mortgage life [page 2] insurance plan through his home mortgage lender, San Francisco Federal Savings. The insurance became effective on June 8, 1989. The insurance pays a death benefit to the home mortgage lender, the amount of which depends upon the mortgage balance.

Minnesota Mutual denied San Francisco Federal Savings' claim for the death benefit (placed in August of 1989), due to the policy's exclusion for death "by suicide, whether sane or insane, within two years from the effective date" of policy coverage. The beneficiary under the policy, Cresencia

Tortuya, Mr. Tortuya's wife, now sues Minnesota Mutual to collect the home mortgage credit she believes is due to her under the policy.

Decedent, an employee of United Airlines, was also a participant of United's Employee Welfare Benefit Plan ("United Plan"), issued through MetLife. The policy provides accidental death benefits. It is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001, et seq.

MetLife denied plaintiff's claim for the accidental death benefit because it determined that Mr. Tortuya's death was not an accident under the terms of the MetLife policy, and because recovery for suicide or intentionally self-inflicted injuries is specifically excluded under the terms of the policy. MetLife affirmed its initial determination following an administrative appeal. Plaintiff now sues MetLife to recover the accidental death benefits she believes are due to her under the terms of the policy.

Plaintiff's husband was a Vietnam veteran with a history of mental disorders, including schizophrenia. He **[page 3]** threatened to kill himself once in 1981 and again in 1985. From 1985 until his death, he routinely visited his treating psychiatrist at the Veteran's Administration ("V.A.") hospital in Palo Alto, California. He was prescribed several different kinds of medications.

Mr. Tortuya visited a psychiatrist at the V.A. Hospital on June 14, 1989 and was prescribed medication to help him sleep. He returned to the hospital on June 19, 1989 and consulted with his regular psychiatrist, Dr. Wittner. Mr. Tortuya complained that he had trouble sleeping in the night before because he had run out of Benedryl, the medication prescribed to him on his previous visit. Mr. Tortuya requested that he be hospitalization was necessary, as the plaintiff seemed to have improved since his previous visit. Dr. Wittner prescribed more medication to help the patient sleep.

On the evening of June 19, 1989, plaintiff and Mr. Tortuya went to bed at about 9 p.m. Mr. Tortuya was restless and anxious because he could not get to sleep. He asked his wife why the medication was not working. After getting up and going back to bed several times, Mr. Tortuya went to the bathroom, put a rifle in his mouth, and shot himself.

II. DISCUSSION

A. Motion for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no **[page 4]** genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The trial judge must grant summary judgment if the evidence presented is so one-sided that the moving party must prevail as a

matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986).

B. Minnesota Mutual's Motion for Summary Judgment

1. Suicidal Intent

This court is bound to follow the decisions of the California Supreme Court in interpreting California law. Meusy v. Montgomery Ward Life Ins. Co., 943 F.2d 1097, 1099 (9th Cir. 1991). Minnesota Mutual and Mrs. Tortuya agree that California law applies to the case under consideration.

The California Supreme Court has held that a life insurance policy excluding payment of a death benefit if the insured commits "suicide, sane or insane" within two years of the issuance of the policy "exempts insurance company from liability only if the insured, whether sane or insane at the time, committed the act with suicidal intent." Searle v. Allstate Life Insurance Co., 38 Cal.3d 425, 427 (1985). The insurance company has the burden of proving that the death was a sui-

cide and that the act was committed with suicidal intent. Id. at 437.

The Searle court held that in order to negate suicidal intent the plaintiff must bring forth evidence to show that the insured did not understand the physical nature and consequences of the act. Id. at 437. Proof that the act was impelled by an [page 5] irresistible impulse does not negate suicidal intent. Id. at 441.

Defendant has clearly met its burden under the first prong of Searle, which requires that the insurance company prove that the death of the insured was the result of a suicide. Both parties agree that the death was an act of self-destruction, rather than an accident. It is undisputed that Mr. Tortuya got out of bed, took the gun out of his closet, went to the bathroom, put the rifle in his mouth, and shot himself.

Defendant has also met its burden under the second prong of Searle, which requires it to prove that Mr. Tortuya committed the act

with suicidal intent. Whether or not he was sane when he killed himself, defendant has pointed to overwhelming evidence to show that Mr. Tortuya understood the physical consequences of the action he took, and therefore intended to commit suicide. The plaintiff's expert witness stated that the V.A. Hospital should have hospitalized the decedent because he was "involved in a crisis which may well lead to suicide" and that "suicidal intentions were clearly present in Mr. Tortuya at various points during the last ten years". (Commodore Decl., ¶ 11, Exh. E.) Another expert witness for the plaintiff believed that Mr. Tortuya knew the gun was "a lethal weapon and if pointed in this direction, [would be] likely to have lethal consequences". (Willcox Decl., ¶ 11, Exh. F.)

Plaintiff argues that because there is evidence that Gene Tortuya was "delusional" or "lacked the ability to make a meaningful choice between committing and not committing suicide," **[page 6]** this case should go to

trial. Plaintiff relies on Reinking v. Philadelphia American Life Ins. Co., 910 F.2d 1210, 1215-1217 (4th Cir. 1990). This reliance, however, is misplaced because Reinking involved an insurance policy that did not include the "sane or insane" clause included in Mr. Tortuya's policy.

Whether or not Mr. Tortuya could make a "meaningful choice" between committing and not committing suicide is immaterial under the Searle test. Searle requires only that Mr. Tortuya understood the physical nature and consequences of his actions. Searle, 38 Cal.3d at 437. Plaintiff's own expert witness agreed that Mr. Tortuya would know without a doubt that he was putting a loaded gun in his mouth and pulling the trigger. He knew the gun was not flowers or a glass of beer. he knew that the consequences of pulling the trigger while the gun was in his mouth would be very serious or fatal. (Blinder Depo., pp. 13-14.)

Plaintiff also attempts to analogize

Norbeck v. Mutual of Omaha Insurance Co., 3 Wash. App. 582 (1970). In Norbeck, the Washington Court of Appeals upheld an award of accidental death policy benefits to the wife of a man who died of a self-inflicted gunshot wound 82 days after he sustained serious head injuries in a construction accident. It recognized a line of Washington Supreme Court workmen's compensation cases in holding that benefits should be paid if any injury leads to the uncontrollable or irresistible impulse to death by self-destruction. The court found that the accident which produced decedent's head injuries, rather than the self-inflicted gunshot wound, was the actual [page 7] cause of the loss suffered. In so holding, the court relied primarily on Travelers' Ins. Co. v. Melick, 65 F. 178 (8th Cir. 1894).

Norbeck is inapplicable for at least two reasons. First, Norbeck was decided under Washington law, whereas this case is governed by California law. Indeed, the holding in

Norbeck regarding "uncontrollable or irresistible impulse" is directly contrary to Searle, the governing California case. In Searle, the California Supreme court specifically held that suicidal intent could not be negated by proof that the insured killed himself under the compulsion of an irresistible impulse. Searle, 38 Cal. 3d at 427.

Second, even if Washington law were applicable, unlike Norbeck, there is no medical evidence that Mr. Tortuya had suffered organic brain damage prior to the suicide. In this respect, this case is more analogous to Meusy v. Montgomery Ward Life Insurance Co., 943 F.2d 1097 (9th Cir. 1991). In Meusy, the Ninth Circuit held that the testimony did not support a chain of causation between decedent's injuries sustained in an earlier car wreck and an uncontrollable or irresistible impulse to death by self-destruction. Id. at 1099.

2. Medical Negligence as a Concurrent Cause of Decedent's Suicide

Plaintiff alleges that her husband's self-inflicted death proximately and predominantly resulted from medical malpractice, a peril that is not excluded by the Minnesota Mutual life insurance policy. Plaintiff invites this court to apply a causation analysis, normally applied in first party property **[page 8]** insurance cases, to the life insurance context. The court declines to do this.

Plaintiff argues that the medical negligence of the V.A. hospital was the "efficient proximate cause, or predominant cause of the loss" of the insured's life. In support of its "efficient proximate cause" theory, plaintiff cites Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395 (1989). Garvey was an action by insureds to determine and enforce coverage for subsidence damage to a house addition under an "all risk" section of their home owner's insurance policy, even though "earth movement" was an excluded peril under the policy. The California Supreme Court ruled that it was an issue of fact for

the jury to determine the proximate cause of the injury.

The California Supreme Court has never applied the efficient proximate cause analysis to require the payment of benefits under a life insurance policy. "Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state's highest court would resolve it." Dimidowich v. Bell & Howell, 803 F.2d 1473, 1482 (9th Cir. 1986).

The California Supreme Court applied Garvey solely to first party property insurance, not to life insurance. Garvey emphasized that first-party property insurance is unique distinguishing it from third-party liability insurance. Id. at 406. Because the California Supreme Court noted the limited nature of Garvey, this court does not believe that it would extend Garvey's holding to cover life insurance claims. This [page 9] court is bound to decline to apply the Garvey analysis in this case. Therefore,

Minnesota Mutual's motion for summary judgment is GRANTED.

C. Metlife's Motion for Summary Judgment

1. Federal Common Law Applies to ERISA Claim

The parties agree that the United Plan in which Mr. Tortuya participated is governed by ERISA. 29 U.S.C. § 1001, et seq. The United States Supreme Court has held that ERISA preempts state law with respect to claims for insurance benefits. Pilot Life Insurance Co. v. Dedaux, 481 U.S. 41 (1987). the Court found that Congress expected that a federal common law of rights and obligations under ERISA-regulated plans would develop. Id. at 56. The careful choice of remedies under the federal scheme would be completely undermined if plaintiffs could obtain state remedies rejected by Congress in enacting ERISA. Id. at 54.

The question in the case before the court is essentially one of contract interpretation. Contrary to plaintiff's argument,

California law does not apply here because California's common law of contract interpretation is not a law that regulates insurance and, therefore, is not saved from preemption under ERISA. Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 494 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989).

2. Standard of Review

Defendant MetLife argues that under ERISA, this court should review its decision to deny plaintiff accidental death **[page 10]** benefits under an "arbitrary or capricious" or "abuse of discretion" standard of review. Plaintiff, on the other hand, argues that this court must review MetLife's decision de novo.

The Supreme Court held that "a denial of benefits [under § 1132 (a)(1)(B) of ERISA] is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115

(1989). Where a court finds that an ERISA plan contemplates discretionary determinations, it must review a fiduciary's eligibility decisions under the plan for abuse of discretion. Williams v. Caterpillar, Inc, 944 F.2d 658, 661 (9th Cir. 1991). In order to determine the proper standard of review to be applied to this case, the court must first determine whether or not MetLife has "discretionary authority" under the terms of the United Plan.

The United Plan provides that "the Insurer [MetLife in this case] or HMO will be solely responsible for the disposition of the claims for benefits." (Warner Supp. Decl., § 6.6, Ex. A). MetLife is responsible for notifying the claimant if the claim is wholly or partially denied. (Warner Supp. Decl., § 6.2, Ex. A). It is also responsible for reviewing denials when requested to do so by claimants. (Warner Supp. Decl., § 6.4, Ex. A). Under the United Plan, MetLife must employ discretion in order to carry out the functions

assigned to it. Therefore, abuse of discretion is the proper standard of review in this case. **[page 11]**

3. MetLife Did Not Abuse its Discretion in Denying Plaintiff's Claim

In determining whether MetLife abused its discretion in denying the plaintiff benefits, the court must examine MetLife's interpretation of the suicide exclusion clause of the "High Limit 24-Hour Personal Accident Insurance" policy. The Policy provides that:

> [I]n no case shall any payment be made for death or any other loss which is cause by: (A) intentionally self-inflicted injury, suicide or any attempt thereof, while sane or insane . . . ."

In Wickman v. Northwestern Nat. Ins. Co., 908 F.2d 1077 (1st Cir. 1990), cert. denied, 111 S.Ct. 581 (1990), the First Circuit outlined the steps the fact finder must take in determining whether or not an injury qualifies as accidental under the terms of an ERISA-regulated insurance policy. The policy at issue in Wickman was an accidental death policy that did not pay benefits if the loss

was either directly or indirectly caused by "suicide or intentionally self-inflicted injury, whether . . . sane or insane." Id. at 1081. The policy, therefore, was similar to the MetLife policy under which Mr. Tortuya participated.

Wickman held that policy terms should be given their plain meaning. Id. at 1084. In determining whether or not an injury was an accident under a policy, the fact finder should begin by examining the expectations of the insured when the policy was purchased. If the fact finder determines that the insured when the policy was purchased. If the fact finder determines that the insured did not expect an injury similar in type or kind to the one suffered, it must then examine whether that expectation was **[page 12]** reasonable. If the fact finder does not have enough evidence to ascertain the insured's subjective expectation, it should then engage in an objective analysis of those expectations. This objective analysis requires that

the fact finder evaluate the expectations from the perspective of a reasonable person in the shoes of the insured. Id. at 1088.

MetLife did not abuse its discretion in determining that a reasonable person should have expected that putting a loaded rifle in his mouth and pulling the trigger would cause great injury or death. Using information from the police report and the death certificate, MetLife determined that Mr. Tortuya died of a self-inflicted injury; as a result, MetLife did not owe his beneficiary, the plaintiff, policy benefits. MetLife's decision that Mr. Tortuya's death cannot be objectively viewed as an accident was both rational and plausible.

In attempting to persuade this court that MetLife's motion for summary judgment should be denied, plaintiff has relied primarily on Searle, a case decided by the California Supreme Court. Because ERISA preempts state law claims, Searle does not apply here. Searle is also inapplicable here because it

involved a life insurance policy, not an accidental death policy. As discussed supra, plaintiff's claim would fail even if Searle did apply. Plaintiff has made no attempt to distinguish Wickman the key case on the issue under consideration.

[page 13] While plaintiff may have stated a cause of action against the United States for medical malpractice,[1] that claim has no relevance to the disposition of this case. For reasons stated supra, the court declines to apply an "efficient proximate cause" analysis in this case. Although the court recognizes the tragedy of Mr. Tortuya's death, it cannot allow Mrs. Tortuya to collect insurance benefits to which she is not entitled.

D. Plaintiff's Motion to Strike

Plaintiff moved to strike various declarations made by defendants in support of summa-

[1]Indeed, plaintiff currently has pending before this court a related case against the United States, Tortuya v. United States, C 91-0338 BAC.

ry judgment. The defendants have cured any defects in the declarations upon which the court relied by submitting supplemental declarations. Plaintiff's motions to strike are therefore DENIED.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that defendants' Minnesota Mutual and MetLife motions for summary judgment are GRANTED. Plaintiff's motions to strike defendants' declaration supporting summary judgment are DENIED.

IT IS SO ORDERED.

Dated: 7/20/92

s/
Barbara A. Caulfield
United States District
Judge

APPENDIX "B"

Court of Appeals Opinion

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CRESENCIA B. TORTUYA, Plaintiff-Appellant, v. METROPOLITAN LIFE INSURANCE COMPANY; THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY, Defendants-Appellees.	)	No. 92-16693 D.C. No. CV-90-03491-BAC MEMORANDUM*

FILED MAY 16 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court for the Northern District of California
Barbara A. Caulfield, District Judge, Presiding

Argued and Submitted
February 9, 1994
San Francisco, California

Before: **HUG**, **FARRIS**, and **O'SCANLAIN**, Circuit Judges.

Appellant Cresencia Tortuya sued Minnesota Mutual Life Insurance Company ("Minnesota

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Mutual") and Metropolitan Life Insurance Company ("MetLife) to recover life insurance benefits after her husband committed suicide and now appeals the district court's grant of summary judgment to the iunsurance companies. We affirm.

I

California law governs appellant's claim against Minnesota Mutual. In order for a suicide exclusion to be valid, the insurer must prove that the decedent acted with suicidal intent. Searle **[page 2]** v. Allstate Ins. Co., 38 Cal. 3d 425, 437-38 (1985). Suicidal intent merely requires that the decedent understood the "nature and consequences of the act." Id.

The evidence is overwhelming that Gene Tortuya ("decedent") understood the nature and consequences of his act, and therefore possessed suicidal intent. First, appellant condedes that decedent got out of bed, looked for the gun because his wife had hidden it from him, found the gun in the closet, went

to the bathroom, put the rifle in his mouth, and shot himself. All of this paints a man with a mission, refuting appellant's contention that the decedent did not "plan[] on killing himself." Second, appellant's own expert witness, Dr. Martin Blinder, stated that "without a doubt" decedent knew that his rifle was "a lethal weapon and if pointed in this direction, it is likely to have lethal consequences." Another one of appellant's own expert witnesses, Evelyn Tabachnick, stated that "suicidal intentions were clearly present in Mr. Tortuya at various points during the last ten years." Third, the appellees' expert, Dr. Robert Litman, stated that decedent intended to kill himself "as pretty much as close to a certainty as one can come within the boundaries of medical evaluation." Finally, the appellant's argument that the decedent was delusional and could not make a meaningful choice is irrelevant under California law. All of the evidence suggests that the decedent understood

the consequences of his act and, thus, had the requisite suicidal intent. Therefore, the district court did not err in granting summary judgment to Minnesota Mutual.

[page 3] II

California law defines efficient proximate cause as "the one that sets others in motion," Sabella v. Wisler, 59 Cal. 2d 21, 31-32 (1963), and as the "predominate cause." Garvey v. State Farm Fire and Cas. Co., 770 P.2d 704, 708 (Cal. 1989). Any alleged medical malpractice is not the event that set the others into motion. It certainly did not make decedent suicidal; indeed, he sought medical help because he was suicidal. At worst, the alleged medical malpractice failed to interrupt the chain of events; this, however, does not constitute efficient proximate cause.

Appellant further argues that "whether the V.A. Hospital committed medical malpractice which could negate suicidal intent, is a triable issue of material fact." This is clear-

ly wrong. Whether his doctors could have prevented decedent's suicide is irrelevant to the fact that he understood the consequences of the act of putting a rifle in his mouth and pulling the trigger.

III

The MetLife policy is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. ERISA preempts state law with respect to claims for insurance benefits. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

Under ERISA, if the court "finds that a plan contemplates discretionary determinations, it must review a fiduciary's eligibility decisions under the plan for an abuse of discretion." Williams v. Caterpillar, Inc., 944 F.2d 658, 661 (9th Cir. 1991). Such is the case here.

[page 4] To determine whether an ERISA fiduciary abused its discretion, we examine whether the decision was arbitrary and capricious and whether it was supported by sub-

stantial evidence. Madden v. ITT Long Term Disability Plan, 914 F.2d 1279, 1285 (9th Cir. 1990), cert. denied, 498 U.S. 1087 (1991). MetLife denied coverage for two reasons. First, it denied coverage because the policy clearly stated that "in no case shall any payment be made for death or any other loss which is caused by: (A) intentionally self-infliced injury, suicide or any attempt thereof, while sane or insane . . . ." Decedent committed suicide. It is not arbitrary and capricious for MetLIfe to invoke the suicide exclusion clause in this case. Substantial evidence supports its decision that because the decedent committed suicide, benefits were not available.

Second, MetLife also denied coverage because the decedent's death was not an accident. This court must "interpret terms in ERISA policies 'in an ordinary and popular sense as would a [person] of average intelligence and experience.'" Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir.

1990) (quoting Allstate Ins. Co. v. Ellison, 757 F.2d 1042, 1044 (9th Cir. 1985)). Accordingly, given its ordinary usage, the word "accident" would not encompass an intentional act whose consequences are known, such as, the suicide in this case. MetLife's decision that Tortuya's suicide was not an accident was not arbitrary and capricious, and was supported by substantial evidence.

[page 5] Appellant argues that efficient proximate cause should be applied to determine whether she is entitled to benefits under the policy. However, appellant advances (and this court can find) no case law where efficient proximate cause has been applied to a case under ERISA. Consequently, we cannot conclude that the fiduciary in this case abused its discretion in not employing efficient proximate cause analysis. Therefore, the district court did not err in granting summary judgment to MetLife.

IV

The rule of contra proferentem is inappli-

cable in this case because there are not two competing reasonable interpretations. The clear language of the insurance policies excludes death caused by suicide, sane or insane. The district court applied the unambiguous language of the policies. When "an insurer has clearly limited its coverage, the limitation's plain language must be respected." Malcom v. Farmers New World Life Ins. Co., 4 Cal. App. 4th 296, 301 (Cal. App. 4 Dist. 1992) (citation omitted); Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990).

V

Because appellant is not the prevailing party, we decline to award her attorneys' fees. Smith v. CMTA-AIM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984).

AFFIRMED.

APPENDIX "C"

Court of Appeals Order
Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CRESENCIA B. TORTUYA,	)	No. 92-16693
Plaintiff-Appellant,	)	D.C. No. CV-90-03491-BAC
v.	)	
METROPOLITAN LIFE INSURANCE COMPANY; THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY,	)	ORDER
Defendants-Appellees.	)	**FILED JUN 15 1994 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS**

Before: HUG, FARRIS, and O'SCANNLAIN, Circuit Judges

Appellant's petition for rehearing is DENIED.

PROOF OF SERVICE

I declare that I am over the age of eighteen years and am not a party to this action. My business address is 101 Larkspur Landing Circle, Suite 223, Larkspur, California, 94939-1750. I am familiar with and have complied with my employer's practice for collection and processing of correspondence for mailing and for hand delivery.

As set forth below, I caused to be served on the parties in this action:

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This service was accomplished by placing true copies of such document in envelopes addressed to and served upon the following offices:

JAMES R. WILLCOX, ESQ.
NATASHA LOVAS, ESQ.
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HON. BARBARA A. CAULFIELD, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

450 Golden Gate Avenue
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CLERK, U.S. NINTH CIRCUIT
COURT OF APPEALS
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Such service was accomplished by sending such document, on the date set forth below, via Federal Express overnight courier, for delivery by September 13, 1994.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Larkspur, California, on the date set forth below.

I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that this declaration was executed on the date set forth below.

DATE: September 12, 1994

Daniel R. Bartley